80-1944

No._____

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Supreme Court of the United States

October Term, 1980

MICHAEL JAMES LUDDY,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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Questions Presented

1. Whether misstatements of fact in an affidavit in support of an application for a search warrant are material, and thus void the warrant, where in a prosecution for possession of controlled substance the misstatements supply:

a. The only identification in the affidavit of a "known drug user and small dealer" said to have frequented the premises to be searched, and

b. The only underlying circumstance presented to the authority issuing the warrant tending to corroborate the affiant's belief in the veracity of a confidential informant.

2. Whether such misstatements void a warrant notwithstanding the absence of evidence of intentional falsity, where they effectively supplant the independent determination of probable cause required of the warrant issuing authority.

3. Whether a supposed admission against penal interest is a sufficient basis for a conclusion that an informant is reliable.

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Opinions Below

The opinion of the Superior Court of Pennsylvania, affirming the trial court's denial of Defendant's Motions in Arrest of Judgment and for a New Trial, is reported in 422 A.2d 601, and be printed in full as Appendix B hereto. The opinion of the Court of Common Pleas of Bucks County, Pennsylvania, has not been published, but is printed in full as Appendix C hereto.

Jurisdiction

The Writ of Certiorari is sought to review an order of the Supreme Court of Pennsylvania entered on February 18, 1981. The order of that court, which is the highest court in Pennsylvania in which a decision could have been rendered, refused Allocatur (discretionary review) of the judgment of the Superior Court of Pennsylvania in this case.

The Superior Court, one of Pennsylvania's intermediate appellate courts, affirmed the judgment of sentence entered by the Court of Common Pleas of Bucks County, Pennsylvania (the trial court) as to petitioner.

Jurisdiction to grant the Writ of Certiorari is conferred on the Supreme Court of the United States by 28 U.S.C. §1257(3), in that the decision of the courts below determined that the federal constitutional rights of Petitioner had not been infringed.

Constitutional Provisions Involved

The petitioner claims the right of freedom from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against

> unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment is applicable to the prosecution in which petitioner was convicted by reason of the Fourteenth Amendment:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

Petitioner is charged with possession of a controlled substance (marijuana) with the intent to manufacture or deliver the substance, with simple possession of a controlled substance, and with conspiracy to commit both crimes. Trial counsel for petitioner filed a motion to suppress evidence on May 19, 1978, prior to the commencement of trial. The motion was expressly premised on petitioner's rights under the Fourth Amendment to the United States Constitution, and it was based on the contention that probable cause to issue a search warrant was not sufficiently established by the afffidavit of one of the prosecuting police officers filed in support of his application for the warrant, among other things.

The case against petitioner was prosecuted along with cases against co-defendants: his brothers, Edmund and

Richard; his mother, Filomena; Timothy Brown, John Charles Froehlich, Jr., and Patrick Warner Rehm; who were all charged with similar crimes. The search warrant was executed against the residence of the Luddy family. Petitioner's motion to suppress evidence was heard along with similar motions filed on behalf of his co-defendants, and the motion filed on behalf of defendants, Brown and Rehm, was based on the additional contention that there were material misstatements of fact in the affidavit in support of the application for a search warrant. All of the suppression motions were heard together; trial counsel for petitioner argued the additional ground of misstatement as a part of that proceeding; both the trial court and the Superior Court of Pennsylvania held that the issue of material misstatement had been properly raised under these circumstances, 422 A.2d 601, 608-609, note 3.

At the conclusion of the suppression hearing, all of the pretrial motions of defendants were denied, and the cases proceeded to trial without a jury, on July 17 and 18, 1978. Defendants, Froehlich and Rehm, were found not guilty; the members of the Luddy family and John Brown were found guilty. Post-trial motions were filed on behalf of Filomena, Michael and Edmund Luddy; the motions were overruled. Filomena and Edmund Luddy received probationary sentences; petitioner, Michael Luddy, was sentenced to imprisonment of not less than eleven and one half nor more than twenty-three months. All three defendants appealed to the Superior Court of Pennsylvania, which reversed the decision of the trial court as to Filomena Luddy and Edmund Luddy, and affirmed the decision as to Michael Luddy. Michael Luddy petitioned the Supreme Court of Pennsylvania for Allowance of Appeal, which was denied on February 18, 1981.

The principal evidence petitioner attempted to suppress was approximately three pounds of marijuana seized by the police during the search of the Luddy residence. The residence was searched on February 23, 1978 under the authority of the search warrant issued that day. The affidavit of probable cause (which is reproduced in its entirety in the appendix) recites that the affiant stopped two juveniles on October 4, 1977, and in a consent search of the vehicle occupied by them he obtained a hand drawn map by which the Luddy residence could be located. According to the affiant, the juveniles stated that they were going to buy marijuana at the Luddy residence. Under instructions from his chief of police, the affiant began a surveillance of the Luddy home on October 6, 1977. The affidavit indicates that during the period of the surveillance a total of twenty-three specifically identified vehicles were observed to visit the residence for short periods of time. The affidavit includes information from an informant who stated that Michael and Richard Luddy deal in marijuana from their residence. The affidavit states that the informant personally purchased marijuana from Michael and Richard Luddy "on several occasions over the past year and as recently as the week of February 13, 1978".

The affidavit states that among the people coming to the Luddy residence during the period of the surveillance were "known drug users and small dealers such as Walter Rehm of York Road, Furlong, Pa. who has been convicted of possession of narcotics" but the trial court found as a fact at the conclusion of the suppression hearing that Walter Rehm was never at the Luddy residence and that he is neither a drug user nor a dealer. The affidavit states that the informant "provided another police department with information that led to the apprehension of an individual with marijuana", but at the

suppression hearing the affiant testified that the informant's prior information had not resulted in an arrest or conviction, although an extremely small amount of marijuana had been confiscated by another police department as a result of the informant's information.

The trial court concluded that the two-pronged test of *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964) had been met, and that the misstatements in the affidavit were neither deliberate nor material.

The Superior Court held that probable cause could not be established by the stop of October 4, 1977, nor by the results of the surveillance, because the information was stale. However, the Superior Court approved the sufficiency of the warrant on the basis that the information attributed to the informant was adequate to establish probable cause.

Reasons for Granting the Writ

This case presents an opportunity for the court to explicate in detail the standards for impeachment of a facially sufficient application for a search warrant on the basis of factual misstatements in the affidavit in support of the application for the warrant.

In *Franks v. Delaware*, 438 U.S. 154, 57 L.Ed. 2d 667, 98 S.Ct. 2674 (1978) this Court decided for the first time that a defendant in a criminal proceeding has the right, under the Fourth and Fourteenth Amendments, subsequent to the *ex parte* issuance of a search warrant, to challenge the truthfulness of factual statements made in an affidavit supporting the warrant, under certain circumstances. Since the Supreme Court of Delaware had held in *Franks* that a defendant under *no* circumstances may challenge the veracity of such an affidavit, this

Court did not have occasion to pass upon the standards necessary for a determination of materiality of any misstatement.

In the present case the trial court permitted pre-trial examination of the affiant, and found after a hearing that the warrant contained misstatements of fact. The appellate courts of Pennsylvania approved the trial court's determination that no constitutional rights of petitioner had been infringed, notwithstanding the misstatements of fact, on the basis that the misstatements were neither deliberate nor material. However, the courts below employed a standard of materiality which, if given general application, would emasculate the Warrant Clause.

The affidavit in this case misidentifies an individual observed at the premises to be searched because the affiant incorrectly assumed that the driver of a particular automobile was its registered owner. In fact, the registered owner was the father of an individual with a drug conviction record, and it was another son of his who had been at the Luddy residence. 422 A.2d 601, 608-609. The Superior Court noted that it would have been better for the police to have explained the basis of their identification, but since the failure of the police to do so was held to be without intent to mislead, the court concluded that the misstatement did not invalidate the warrant. Nevertheless, it remains true that "inclusion of a specific detail, such as a name, within an otherwise general statement may give the entire statement an air of strength it would not otherwise have." 422 A.2d at 609.

The standard of materiality employed in *Franks* for the purpose of determining whether a defendant is entitled to a hearing on the veracity of the warrant affidavit requires analysis of whether the affidavit is sufficient with the allegedly false material set to one side. 438 U.S. at

171-172. The Court did not have occasion to apply the test because of Delaware's absolute rule against impeachment of warrant affidavits, rather than the Court's stated reason that "the framing of suitable rules to govern proffers is a matter properly left to the states . . ." 438 U.S. at 172. But since the decision in *Franks* was clearly based on the language of the Warrant Clause itself for the requirement of a *truthful* showing of probable cause, 438 U.S. at 164, the standard of materiality should also be a matter of constitutional dimension.

Since probable cause is determined by the warrant-issuing authority solely on the basis of the four corners of the warrant affidavit itself, it is logically possible that a misstatement in the affidavit might taint the entire determination. In the present case, the misstatement relating to the identity of an individual said to have frequented the premises to be searched supplied the only corroboration in the affidavit of the fact that at least one of the visitors to the premises was a "known drug user and small dealer". Absent the association with drug use, the fact that an individual receives a large number of visitors should not justify a man of reasonable caution in concluding that illegal activity is taking place at the premises.

It should not matter whether a misstatement is deliberate or negligent for the purposes of the Fourth Amendment, because the protection of the Warrant Clause "consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 13-14, 92 L.Ed. 436, 68 S.Ct. 367. The constitutional necessity of separating inferences from factual observations is at the heart of the rule in *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964).

There was no suggestion in *Aguilar* that the statement of the affiant in that case that had received reliable information from a credible person relating to narcotics at the premises to be searched was untrue—the problem was that the inference of reliability was drawn by the police officer and not by the magistrate, as the constitution requires. In this case the police drew their own inference that the driver of a specific automobile was an individual with a drug conviction record. Had the police presented the simple factual basis on which they drew that inference, the constitutional problem would not have arisen. Whether or not the magistrate himself would have drawn the same inference is of no consequence because he was not provided the opportunity to do so.

The petitioner in this case does not contend that absolute accuracy in a warrant affidavit is constitutionally required, but administration of the Warrant Clause would be greatly facilitated by a simple rule that the affidavit contain only statements of fact, and that it be devoid of inferences on the part of the affiant.

The requirement that an affiant limit statements in a search warrant application to factual observations, excluding any inferences he may have drawn, is not onerous. The distinction is simple and practicable. This is not to say that erroneous inferences will be completely prevented by such a requirement, but the benefit of a simple rule prohibiting inferences on the part of affiants is that preservation of the right of privacy will remain the duty of the warrant-issuing authority, rather than the police.

The decision in *Franks v. Delaware* should also be further explained because the opinion of this Court did not discuss authorities then in existence holding that an intentional misstatement in a warrant application voids the

warrant, regardless of whether or not such statements are material to establishing probable cause, such as *U. S. v. Character*, 568 F. 2d 442 (Fifth Circuit 1978), *U. S. v. Lyon*, 567 F. 2d 777 (Eighth Circuit 1977), *U. S. v. Hunt*, 496 F. 2d 888 (Fifth Circuit 1974), *U. S. v. Thomas*, 489 F. 2d 664 (Fifth Circuit 1973), *Commonwealth v. Reynolds*, 370 N. E. 2d 1375 (Massachusetts 1977) and *State v. Little*, 560 S. W. 2d 403 (Tennessee 1978). *Franks* treated intentional and reckless falsehoods in exactly the same way, but the preference for search warrants articulated in *U. S. v. Ventresca*, 380 U. S. 102, 85 S.Ct. 741, 13 L.Ed. 2d 684 (1965) should result in a conclusion that when false allegations are removed from a search warrant affidavit, a doubtful or marginal case should be resolved in the defendant's favor.

In this case the Superior Court felt that the second prong of *Aguilar* had been met because the informant's supposed statement to the affiant constituted an admission against his penal interest, and as such it was an indication of reliability. Preliminarily, it must be noted that the admission against interest must be supposed from a "common sense" reading of the affidavit because the affidavit does not expressly say that the informant made the statement himself. The necessity for such a "common sense" reading would be eliminated by adoption of the simple rule against inferences advocated in this argument.

The third paragraph of the warrant affidavit in this case, relating to information received from the informant, states hearsay information from an unidentified police department from which a conclusion of reliability is sought to be drawn. The clear implication of the statement is that another police department obtained a drug conviction on the basis of information from this informant, but at the suppression hearing it was established

that the informant's information had not led to an arrest or a conviction. Although it is not contended that this statement was intentionally misleading, the effect of the sentence concerning the informant's reliability was to insulate the warrant-issuing authority from the evidence necessary to his determination of reliability.

Furthermore, a "common sense" reading of the affidavit does not necessarily result in the conclusion that the informant made an admission against penal interest: The statement that the informant has purchased marijuana from Michael and Richard Luddy could just as logically have been supplied by the unidentified police department as by the confidential informant. Indeed, the structure of the third paragraph of the affidavit indicates that the information following the colon was supplied by the informant; by implication, the information preceding the colon relates to reliability and was supplied by the unidentified police department.

Even if it is determined that the affidavit fairly sets forth an admission against penal interest, the reasoning attributing reliability to such an admission is subject to question. The courts below cited a body of Pennsylvania case law theoretically based on *Aguilar*, including *Commonwealth v. Albert*, 264 Pa. Super. 390, 399 A.2d 1106 (1979) and *Commonwealth v. Ambers*, 225 Pa. Super. 381, 386, 310 A.2d 347, 350 (1973). Although not cited by the courts below, this conclusion also finds support in *U. S. v. Harris*, 403 U. S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723. But it is not clear that the principle received the support of a majority of this Court, since the part of the opinion discussing the effect of an admission against penal interest was subscribed only by four Justices. As Mr. Justice Harlan noted in dissent, the argument was not pressed by the Government and the traditional preconditions to use of such an admission were not present. 403 U.S. at 594-596.

As in *Harris*, the supposed admission against penal interest in this case amounts to little more than uncorroborated hearsay. This is especially so in view of the statement of the affidavit that police had conducted a four month surveillance at the premises to be searched, and there is no corroboration by the affiant of the informant's presence at the premises at any time during that period.

In conclusion, the standards of materiality to which this court alluded in *Franks v. Delaware* should be the subject of further guidance from this court, because even a nonintentional misstatement may taint the warrant-issuing authority's determination of probable cause, where the misstatement supplies relevant detail without which the overall effect of the affidavit would be considerably less persuasive.

Respectfully submitted,

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APPENDIX A

Affidavit of Probable Cause

On October 4,1977 at approx 10:10 P.M. the affiant observed two juviniles sitting on the south side of the Warwick Tavern Parking Lot in a Blue V.W. Beetle bearing Pa. Reg. Plates for 1977 of X48-928 this vehicle was found to be occupied by Brenda Fox 9-16-60 and Gary Froelich 8-27-59 passing something between them. Upon the affiants investigation of above aquantity of cash in United states currency in Five, Ten and twenty dollardnominations was observed on the transmiss hump,and drivers seat edge along with apipe. These items were seized by Ms.Fox and placed in her hand bag when the affiant was noticed by the occupants of the vehicle. Permission to search was granted the affiant by the Fox girl to her purse and vehicle and a total cash value of the monies observed on the transmiss hump amounted to $125.00 U.S.C. along with the small Marijuana Pipe with residue and other drug Paraphnailia in the purse. The vehicle contained a Hand drawen Map which depicted a House on Alms House Rd. Jamison Warwick Twp Bucks CountyPa situated directly across from the driveway entrance off of Alms House Rd to Saint Cyril Church. The house had the word Mikes next to it with the phone number of 343-0778. The white famale having been given her rights previously was asked to explain 5he map. Her explanation stated that she and Gary were combining their money before going to the house on the map to buy a quant of grass (marajuana) and that the map was so they could find the house and the p phone number was to be called if they became lost. The phone number is an unlisted number belonging to one Michael Luddy of 1425 Alms House Rd. Jamison XX Warwich Twp. Bucks County Pa. 18929. This information was passed on to Chief James Mc-

Callister of the Warwick Twp. Police who instruted the affiant to begin a survallance of Michael Luddy's home begining on Oct.6,1977 and be on going to gather information.

On October 6,1977 survallence was begun on the home of Michael Luddy, Rick,Edwar and filomena luddy at 1425 Alms House Rd. Jamison Warwick Twp. Bucks County Pa. This survallance along with survallance in the comeing months showed a large number of vehicles comeing too and staying at the afore mentioned house for short periods of time (10-15minutes), the occupants from these vehicles would e enter and leave the house thru the corner door on the North West side of the structure. These people included knowen drug users and small dealers such as Walter Rehm of york Rd. Furlong Pa. who had been convicted of possession of narcotics. Checks with other police departments confirmed these facts. All of these vehicles would make their appearance at the residence at least three or more timesfrom Oct.6,1977 to 2-22-78.

On February 21,1978 at 1930hrs. a reliable informant who has provided another Police Department with information that lead to the apprehention of an individu with Marajuana and who has XXXX purchased marajuana at the above me mentioned residence from Michael and Richard Luddy on several occassions over the past year and as recently as the week of February 13,1978 provided the following information to the affiant: That Michael and Richard Luddy deal in Marajuana from their residence in ounce and quarter pound quantities, they also can provide a purchaser with a half pound or more of marajuana,but the purchaser is required to wait a few days so as not to diminish the supply that they have on hand at the residence. That when L.S.D. ACID is

availible that Richard and michael Luddy also supply this drug substance from their residence.

XXXXThat Michael and Richard Luddy have a distribution syestem that starts from their residence (for Marijuana) where one Tim Brown of Buckingham who has been obsearved at the Luddy Residence in his Black older Model panel truck on several occassions and as recently as 6:20 P.M. on 2-21-78. That Brown arrives and takes from Michael and Richard Luddy Quarter pound quantities of Marajuana places them in his truck and then distributes these quantities to juvinile or young adult runners who in turn sell the quarter pounds they receive for cash which is then turned back over to Brown.The runners profit from the sales being that they receive a free quarter ounce of marajuana for their own use. The cash is then split between Brown and Richard and Michael Luddy.

APPENDIX B

Opinion of Superior Court

COM. v. LUDDY

Cite as, Pa. Super., 422 A.2d 601

COMMONWEALTH of Pennsylvania,
v.
Michael LUDDY, Appellant.

COMMONWEALTH of Pennsylvania,
v.
Filomena LUDDY, Appellant.

COMMONWEALTH of Pennsylvania,
v.
Edmund LUDDY, Jr., Appellant.

Superior Court of Pennsylvania.

Argued March 10, 1980.

Filed Oct. 31, 1980.

Before SPAETH, BROSKY and VAN der VOORT, JJ.

SPAETH, Judge:

This is a consolidated appeal by three members of the same family, Filomena Luddy and her sons Edmund and Michael. Filomena Luddy, appellant in No. 615, and Edmund Luddy, appellant in No. 616, were convicted of unlawful possession of a controlled substance. Michael Luddy, appellant in No. 514, was convicted of unlawful possession of a controlled substance, possession with intent to manufacture or deliver a controlled substance, and conspiracy. Three issues have been raised: 1) whether the evidence was sufficient to support Filomena Luddy's conviction; 2) whether Edmund Luddy was illegally searched; and 3) whether the warrant pursuant to which the Luddy residence was searched was a valid warrant.

1

Filomena Luddy was convicted of possession of two small bags of marijuana found in the crisper compartment of the refrigerator in the kitchen of the Luddy residence. The principles by which we must judge the sufficiency of the evidence to sustain her conviction are well settled.

Our Supreme Court has said repeatedly that "illegal possession of narcotic drugs is a crime which 'by its very nature is unique to the individual. By definition, the possessor is the only person who could commit the crime. Guilt by association ... is unacceptable.'" *Commonwealth v. Chenet,* 473 Pa. 181, 184-185, 373 A.2d 1107, 1108 (1977), *quoting Commonwealth v. Fortune,* 456 Pa. 365, 368-69, 318 A.2d 327, 328 (1974), *in turn quoting Commonwealth v. Reece,* 437 Pa. 422, 427, 263 A.2d 463, 466 (1970). Accordingly, if the Commonwealth is unable to prove the defendant's actual possession of the drugs, it must prove constructive possession. To prove constructive possession the Commonwealth must prove that the defendant had both the power to control the contraband and the intent to exercise that control. *Commonwealth v. Townsend,* 428 Pa. 281, 237 A.2d 192 (1968).

Constructive possession may be inferred from the totality of the circumstances. *Commonwealth v. DeCampli,* 243 Pa. Super. 69, 364 A.2d 454 (1976). However, evidence that the defendant was one of a group of persons on the scene where the contraband was found is insufficient to support an inference of constructive possession. This is so because "the fact of possession loses all persuasiveness if persons other than the accused had equal access with him to the place in which the property was discovered: 9 Wigmore on Evidence (3rd ed.) §2513."

Commonwealth v. Kauffman, 155 Pa.Super. 347, 351, 38 A.2d 425, 427 (1944). "[T]he evidence must establish that the [defendant] had a conscious dominion over the contraband." *Commonwealth v. Fortune, supra*, 456 Pa. at 368, 318 A.2d at 328.

It is instructive to consider cases in which the evidence was held insufficient to establish such conscious dominion. In *Commonwealth v. Tirpak*, 441 Pa. 534, 272 A.2d 476 (1974), the police found seven persons, among them the four defendants, in a game room where there was an open jar containing marijuana and an ashtray containing the butts of four marijuana cigarettes; no marijuana was found on the person of any of the defendants, and none of them was seen smoking marijuana cigarettes. The Supreme Court held this evidence insufficient to prove the defendants' constructive possession of marijuana. In *Commonwealth v. Davis*, 444 Pa. 11, 280 A.2d 119 (1971), the police found the defendant, another man, and a woman in the woman's apartment, and in a closet in the basement, stolen dresses; the woman had keys to the closet, and there was no evidence that the defendant also had access to the closet. The Supreme Court held this evidence insufficient to prove the defendant's constructive possession of the stolen dresses. In *Commonwealth v. Fortune, supra*, the police found twenty-one packets of heroin on the floor in the doorway between the kitchen and rear shed. No one was in the kitchen or rear shed; three men and a woman were in the living room. The defendant, after the police entry, came downstairs, went through the living room, and entered the kitchen, where an officer was picking up the packets of heroin from the floor. The defendant said, "Don't lock me up." Holding this evidence insufficient, the Supreme Court stated:

> There is no evidence that the [defendant] had any knowledge of the presence of the drugs in her home prior to the arrival of the police. The [defendant's] residency in the home does not establish any such knowledge. We cannot assume that a resident of a home, where guests are present, knows of the full contents of the premises. The [defendant's] remark, "Don't lock me up," is at best equivocal as to whether the [defendant] had any prior knowledge that drugs were on the premises. 456 Pa. at 369, 318 A.2d 329.

In *Commonwealth v. Chenet, supra,* the police waited at the defendant's trailer until the defendant's roommate arrived with his girlfriend. The police then searched the trailer and found a few marijuana seeds on the kitchen floor, marijuana cigarette butts in an ashtray in the living room, and a "baggie" containing marijuana residue in the living room. The police also found some 80 grams of marijuana in a milk delivery box attached to the trailer hitch. They remained at the trailer until the defendant arrived, and found two marijuana cigarettes in the console of the car he was driving; the car belonged to the defendant's attorney. Holding this evidence insufficient, the Supreme Court stated:

> The marijuana found in and around the trailer was in the living room, kitchen and outside area immediately adjacent to the trailer. All of these areas were equally accessible to [the defendant's] roommate and his girlfriend. No marijuana was found in [the defendant's] room nor on [the defendant's] person. The marijuana found in the car which belonged to [the defendant's] attorney was the only evidence which could implicate [the defendant]. We believe, however, the Commonwealth has failed to prove beyond a reasonable doubt that [the defendant] knew about and was in possession of two marijuana cigarettes in a third party's car.
>
> 473 Pa. at 185, 373 A.2d at 1109.

Here, the evidence was insufficient to establish that appellant Filomena Luddy had conscious dominion over the two bags of marijuana in the crisper compartment of the refrigerator. She was one of four adults living in the house. No marijuana was found on her person or in her room. At the time the police arrived there were five other adults including two of her sons in the house; a third son was in the yard outside. Not only was there no direct evidence indicating that she knew that the marijuana was in the crisper but there was no evidence on how long it had been there or who had put it there.

At the time the police arrived, appellant was in the kitchen preparing a roast. From this the lower court concluded that she was "aware of and likewise in possession of the content[s] of the refrigerator" because "the person performing the cooking function for the family unit, in this case [appellant], is the captain of that particular ship." Slip op. at 21. Reference to "the captain of a ship" may be appropriate where the issue is vicarious civil liability, but not where it is criminal liability. Moreover, there is no evidence that appellant was "the captain"; as mentioned, the other six persons there were all adults; nothing suggests they were under appellant's control. So far as appears, they all had equal access to the refrigerator. Anyone of them might have put the marijuana in the crisper compartment, without appellant's knowledge. Merely because appellant was in the kitchen does not establish that she knew the marijuana was in the crisper. *Commonwealth v. Fortune, supra.* But even if knowledge were established, control would still have to be separately established. In *Commonwealth v. Tirpak, supra,* where the marijuana was in an open jar in the center of the room, the defendants almost certainly

had knowledge of its presence, yet the Supreme Court found this insufficient to prove constructive possession.

Accordingly, appellant's motion for an arrest of judgment must be granted.

2

When the police arrived with the search warrant at the Luddy residence, they spotted appellant Edmund Luddy working in a shed near the house. One of the officers in the search party was detailed to take appellant into custody. This was done because appellant was recognized as one of those named in the warrant as residents of the property to be searched.[1] The warrant, however, did not authorize a search of his person, nor, in contrast to his two brothers Michael and Richard, was he mentioned in the probable cause section of the warrant. After apprehending appellant, the officer conducted a patdown search during which he felt in appellant's inside shirt pocket an object that he believed to be a small knife. When examined, the object proved to be a three inch syringe with its cover in place. The officer arrested appellant for possession of a syringe and conducted a full search of his person during which small quantities of methamphetmaine hydrochloride and marijuana were discovered.

Appellant moved to suppress the methamphetamine and marijuana, but the motion was denied and they were admitted in evidence at trial; it is for their possession that appellant has been convicted.

[1] The first paragraph of the application for the warrant, entitled "Identify items to be searched for and seized (be as specific as possible)," reads: "Marijuana L.S.D. or other controlled substances, scales and other drug paraphernalia and evidence of occupancy of Michael, Edmund, Richard and Filomena Luddy."

It is settled that a warrant authorizing the search of a building does not authorize the search of either the persons, *Commonwealth v. Reece*, 437 Pa. 422, 263 A.2d 463 (1970), or the property. *Commonwealth v. Platou*, 455 Pa. 258, 312 A.2d 29 (1973) *cert. denied*, 417 U.S. 976, 94 S.Ct. 3183, 41 L.Ed.2d 1146 (1974) of those who merely happen to be present when the warrant is executed. Nor does the Commonwealth argue that the search warrant for the Luddy residence in itself authorized the search of appellant's person. Instead, it argues that "officers executing a search warrant [have] a right to attend to the security of the premises to be searched, and the environs of those premises, in accordance with the general principles set forth by the United States Supreme Court in *Terry v. Ohio* [392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889], . . ." Commonwealth's Brief at 14. This very argument, however, was made in *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979), and was rejected.

In *Ybarra* the police had a warrant based on probable cause to search a tavern for heroin, other controlled substances, and paraphernalia. Upon entering the tavern, the police announced their purpose and advised all those present that they were going to conduct a "cursory search for weapons." One of the officers then proceeded to pat down each of the 9 to 13 customers in the tavern. Ybarra was one of those customers. When the officer patted Ybarra down, he felt in Ybarra's pants pocket what he described as "a cigarette pack with objects in it." The officer made a second search, in which he took the pack from Ybarra's pocket, and found six packets of heroin inside it. The State argued that the patdown was a reasonable frisk for weapons, authorized by *Terry*, and that as this patdown had yielded probable cause to

believe that Ybarra was carrying narcotics, the second search, of Ybarra's pocket, was justified. Emphasizing the important governmental interest in controlling narcotics and the ease with which narcotics may be hidden, the State further argued that when executing a search warrant, the police should be authorized to search persons on the premises who they reasonably believe are connected with drug trafficking and may be concealing contraband. Although three Justices accepted the State's argument, the other six did not. Speaking for the majority, Justice STEWART held that the patdown of Ybarra could not be justified on the basis of the desire by the police to secure the premises they planned to search, but could only be justified if the conditions of the "narrow" exception created by *Terry* to the requirement of probable cause were satisfied. Under this narrow exception, the officer was not entitled to patdown Ybarra unless he had a reasonable belief that Ybarra "was armed and presumably dangerous" 444 U.S. at 92, 100 S.Ct. at 343. However, no such reasonable belief was shown: "[T]he State is unable to articulate any specific fact that would have justified a police officer at the scene in even suspecting that Ybarra was armed and dangerous." *Id.* at 93, 100 S.Ct. at 343. Accordingly, the conditions of the narrow exception created by *Terry* were not satisfied, from which it followed that the patdown of Ybarra was not justified, from which it further followed that the search of Ybarra's pants pocket was also not justified.

So here, the Commonwealth did not articulate any specific fact that could have justified a belief by the officer that appellant was armed and presently dangerous.

The chief of police testified at the suppression hearing that weapons had been found at the Luddy residence previously. This testimony was insufficient to justify the patdown of appellant. There was no evidence that any weapons violation had occurred, or that there was any connection between appellant and those weapons. In *Commonwealth v. Bourke,* 218 Pa.Super. 320, 280 A.2d 425 (1971), the police, in the course of executing warrants authorizing the search of mobile homes, to look for narcotics there, proceeded to search each person in the area for weapons; of the four defendants thus searched, one was found to have two envelopes of marijuana in his shirt pocket. The Commonwealth argued that the search was justified because "there were reports of weapons in the area and ... guns were found in the trailers and around the picnic grounds ..." 218 Pa.Super. at 323, 280 A.2d at 427. We found this argument without merit, because "it is obvious from [the officer's] testimony that there was no threat of violence by any of the picnickers to justify a search for weapons." *Id. And see Commonwealth v. Reece,* 437 Pa. 422, 263 A.2d 463 (1970); *Commonwealth v. Gillis,* 217 Pa.Super. 159, 269 A.2d 135 (1970) (Concurring opinion by HOFFMAN, J.)

There is a direct chain of events from the patdown of appellant to the discovery of the drugs he was convicted of possessing. If he had not been patted down, the syringe would not have been found in his pocket; if he had not been arrested for possession of the syringe and subjected to a full search, the methamphetamine and marijuana would not have been found. Thus, the methamphetamine and marijuana represented the fruits of an illegal search, and appellant's motion to suppress

should have been granted. Since it was not, appellant must be granted a new trial.[3]

3

The affidavit in support of the application for the search warrant for the Luddy residence was not well drafted. The Commonwealth admits as much. Any search warrant affidavit must give the issuing authority the basis for making an independent judgment that probable cause for a search exists at that time. This foundation must meet the constitutional tests laid down in *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), and *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). In Pennsylvania, nothing outside the written search warrant affidavit may be considered in determining the existence of probable cause. Pa.R.Crim.P. 2003(a). However, it is also clear that search warrant affidavits are to be read in a sympathetic, common sense manner, with due regard for the hectic conditions under which they are often prepared. *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965); *Commonwealth v. Billock*, 221 Pa.Super. 441, 289 A.2d 749 (1972). Furthermore, an affidavit is to be considered as a whole, *Commonwealth v. Bryant*, 247 Pa.Super. 386, 372 A.2d 880 (1977), and a

[3] Appellant has argued that the officer's testimony that he thought a three inch covered syringe standing upright in an inside shirt pocket felt like a knife (as opposed to a pen or pencil) was incredible, and that the syringe, which had no controlled substance in it, by itself did not provide probable cause for arrest. Given our conclusion that the patdown was illegal, we need not consider these arguments.

Appellant has also argued that his motion in arrest of judgment should have been granted. This argument is without merit. Had the evidence been properly obtained, it was sufficient to support appellant's conviction.

successful attack on part of it will not invalidate the warrant if enough remains to establish probable cause, *Commonwealth v. Tucker,* 252 Pa.Super. 594, 384 A.2d 938 (1978).

The first paragraph of the probable cause section of the affidavit before us recounts an incident that took place more than four months prior to the issuance of the warrant. By itself this information would be stale and not support a finding of probable cause. *Commonwealth v. Shaw,* 444 Pa. 110, 281 A.2d 897 (1971); *Commonwealth v. Hagen,* 240 Pa.Super. 444, 368 A.2d 318 (1976). However, it was as a result of this incident, in which two young people were found with a map containing directions to the Luddy residence and a quantity of cash and one of them told the police that they were on their way to buy drugs from one of the present appellants, that the police began a four and a half month surveillance of the Luddy residence.

The second paragraph of the affidavit reports the results of this surveillance. Appellants argue that because no specific dates are given, all of the observations must be assumed to have been made at the most remote point in time, and thus should be held stale. *Commonwealth v. Novack,* 233 Pa.Super. 236, 335 A.2d 773 (1975). If the affidavit had ended with the second paragraph we should be inclined to agree, but it did not.

Appellants also argue that the evidence at the suppression hearing established that the only individual identified by name as having been observed during the surveillance had in fact never been at the Luddy residence and that the misidentification constituted a

material misstatement in the affidavit.[3] The misidentification was explained at the suppression hearing as the result of matching automobile registration records with drug conviction records. The police assumed, incorrectly, that the registered owner of one of the automobiles seen at the Luddy residence was the same individual who had a drug conviction. In fact, the registered owner was the father of the individual with the conviction, and it was another son of his who had been at the Luddy residence.

The affidavit as written did clearly imply that the police knew something—the identity of a visitor to the Luddy residence—when in fact they were only making a reasonable guess. Inclusion of a specific detail, such as a name, within an otherwise general statement may give the entire statement an air of strength it would not otherwise have. Obviously, it would have been better for the police to have explained the basis of their identification. However, it does not appear that their failure to do so was with any intent to mislead; and even a deliberate misstatement does not invalidate a warrant if probable cause remains after the deletion of the misstatement.

[3] The Commonwealth argues that the issue of a material misstatement is not properly before us because it was not specifically raised by appellants in their written pre-trial motions. It was, however, raised by one of their co-defendants. The issue was argued by both counsel at the consolidated suppression hearing and the suppression judge made it clear that he was considering it with regard to all defendants, including appellants. The issue was also raised by appellants in their post-verdict motions and was considered by the court en banc and discussed in its opinion. In these circumstances we believe the issue is properly before us. All of the policy reasons for requiring issues to be raised at the earliest possible time have been met. *See Commonwealth v. Throckmorton*, 241 Pa.Super. 62, 68-69, 359 A.2d 444, 447-448 (1976). The record before us for appellate review is identical to what it would have been if appellants rather than their co-defendants had been the ones to have originally raised the issue in their pre-trial motion.

Commonwealth v. Tucker, supra. Nor in the context of the entire affidavit was the misstatement here so great as to prevent the issuing authority from making an objective and detached determination of probable cause. *Commonwealth v. Smith,* 250 Pa.Super. 436, 378 A.2d 1015 (1977), *cert. denied,* 439 U.S. 835, 99 S.Ct. 118, 58 L.Ed.2d 131 (1978).

The third and final paragraph of the affidavit contains information provided by an informant. Appellants claim that the affidavit does not meet either of the two requirements of the *Aguilar* test for determining probable cause based on the hearsay statement of an informant.[4]

[4] The paragraph in question reads:

On February 21, 1978 at 1930 hrs. a reliable informant who has provided another Police Department with information that lead to the apprehention of an individual with Marajuana and who has personnally purchased marajuana at the above mentioned residence from Michael and Richard Luddy on several occassions over the past year and as recently as the week of February 13, 1978 provided the following information to the affiant: That Michael and Richard Luddy deal in Marajuana from their residence in ounce and quarter pound quantities, they also can provide a purchaser with a half pound or more of marajuana, but the purchaser is required to wait a few days so as not to diminish the supply that they have on hand at the residence. That when L.S.D. ACID is availible that Richard and michael Luddy also supply this drug substance from their residence. That Michael and Richard Luddy have a distribution syestem that starts from their residence (for Marijuana) where one Tim Brown of Buckingham who has been observed at the Luddy residence in his Black older Model panel truck on several occasions and as recently as 6:20 P.M. on 2-21-78. That Brown arrives and takes from Michael and Richard Luddy Quarter pound quantities of Marajuana places them in his truck and then distributes these quantities to juvinile or young adult runners who in turn sell the quarter pounds they receive for cash which is then turned back over to Brown. The runners profit from the sales being that they receive a free quarter ounce of marajuana for their own use. The cash is then split between Brown and Richard and Michael Luddy.

Appellants object that it is not stated in so many words how the affiant knew that the informant had made purchases of marijuana at the Luddy residence. This objection, as we will see, implicates both requirements of the *Aguilar* test. Although the affidavit does not say so in so many words that "the informant told me that he made purchases. . . .", the suppression judge and the court *en banc* in ruling on the post verdict motions were both willing to read it that way. To do so is to do no more than to give the affidavit the common sense reading we are instructed to give it by such cases as *United States v. Ventresca, supra,* and *Commonwealth v. Billock, supra.*

The first requirement of *Aguilar* is that the issuing authority must be informed in sufficient detail so that he is able to judge for himself the persuasiveness of the facts relied upon; the affidavit of probable cause must not be stated in merely conclusory terms. Thus, it is not sufficient for an affidavit to recite that an informant reported certain information. It must also be indicated how it was the informant came to have that information. *Spinelli v. United States, supra.*

Reading the affidavit before us as stating that the informant said that he went to the Luddy residence and purchased marijuana there, we know how the informant knew that marijuana was available there for sale—on the basis of his own observation and experience. The affidavit then goes on in some detail to describe a distribution system for marijuana and other drugs, allegedly based at the Luddy residence. This detail goes well beyond what the issuing authority could fairly infer the informant would have necessarily observed while making a

purchase of marijuana at the residence, and we shall therefore not ourselves make such an inference.

The second requirement of *Aguilar* is that the issuing authority must be informed of some of the underlying circumstances from which the officer concluded that the informant was reliable. In *Commonwealth v. Albert*, 264 Pa.Super. 390, 399 A.2d 1106 (1979), we stated:

> With respect to the informant's reliability, this court has pointed to four factors that the magistrate should consider: "(1) Did the informant give prior reliable information? (2) Was the informant's story corroborated by any other sources? (3) Were the informant's statements a declaration against interest? (4) Does the defendant's reputation support the informant's tip?" *Commonwealth v. Ambers*, 225 Pa.Super. 381, 386, 310 A.2d 347, 350 (1973); *see also In re Burton and Burton*, 259 Pa.Super. 20, 393 A.2d 696 (1978). In *In re Burton and Burton, supra*, however, we made it clear that all four factors need not be present to show reliability, and went so far as to say that the absence of all four factors will not automatically preclude a finding "that a substantial basis exists for crediting the hearsay." At 23, 393 A.2d at 697.
>
> *Id.* at 395, 399 A.2d at 1109.

Thus, the bare statement that the informant "has given reliable information in the past" is not sufficient. *Commonwealth v. Mathieson*, _____ Pa.Super. _____, 419 A.2d 1213 (1980).

Here, as we have discussed, a fair reading of the affidavit is that the informant told the officers that he had purchased marijuana in the Luddy residence. This constituted a declaration by the informant against his

penal interest; as such it was an indication of reliability. *Commonwealth v. Ambers, supra.* The affidavit also recites that the informant had given information to another police department, which led to the apprehension of an individual with marijuana. Appellant objects that this statement was misleading because it did not affirmatively recite that the apprehension in question did not result in an arrest. In fact, the statement was not misleading but, as the testimony at the suppression hearing shows, entirely accurate. Appellant's argument confuses two issues. We are not at this point concerned with whether the affidavit was invalid because it contained a deliberate material misstatement as discussed above, it did not—but with whether it contained sufficient information for the issuing authority to decide that the informant was reliable.

Our cases do not establish a rule that an informant may not be found reliable unless his information led to convictions, *Commonwealth v. Albert, supra, Commonwealth v. Hunt,* 256 Pa.Super. 140, 389 A.2d 640 (1978); *Commonwealt v. Archer,* 238 Pa.Super. 103, 352 A.2d 483 (1975). In any case, putting aside entirely the statement about the informant having given information to another police department, still we believe that the informant's statement regarding his own purchase of marijuana at the Luddy residence, most recently no more than ten days before the warrant was issued, was sufficient to show his reliability.

We therefore conclude that both requirements of the *Aguilar* test were satisfied. We are particularly willing to read the affidavit sympathetically and as a whole, *Commonwealth v. Bryant, supra,* because there is no suggestion here of police misconduct. As recounted in the af-

fidavit, a specific incident led the police to begin a four and a half month surveillance of the Luddy residence. After information from the surveillance had been supplemented by a tip from an informant, a warrant was sought and properly executed. It is unfortunate that after so much effort on the part of the police, the warrant affidavit was poorly drafted. However, the contrast between the careful investigation and the poorly drafted affidavit does make particularly relevant the admonition in *United States v. Ventresca, supra,* that "[a] grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." 380 U.S. at 108, 85 S.Ct. at 745. The judgment of sentence of Michael Luddy will therefore be affirmed.

The judgment of sentence in Appeal No. 615 is vacated and appellant ordered discharged.

The judgment of sentence in Appeal No. 616 is vacated and a new trial granted.

The judgment of sentence in Appeal No. 514 is affirmed.

VAN der VOORT, J., concurs in the result.

APPENDIX C

Opinion and Order of Trial Court

COURT OF COMMON PLEAS OF BUCKS COUNTY
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA

v.

EDMUND LUDDY, Jr.
FILOMENA F. LUDDY
MICHAEL J. LUDDY

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710 of 1980

Before: BODLEY, GARB, LUDWIG & MIMS, JJ.

Defendants Edmund Luddy, Jr., Michael J. Luddy, Filomena Luddy and Timothy John Brown, were found guilty by the undersigned in a trial without a jury of various of the charges contained in the criminal information filed against them. Several of the defendants named in criminal information 710-2 were found not guilty. As a result of the convictions, however, the four defendants have filed post trial motions as in the nature of motions in arrest of judgment and for a new trial. The motions of Edmund Luddy, Jr., Michael J. Luddy and Filomena F. Luddy have been argued before the court *en banc* and are hereby dismissed.

The motion for a new trial was based primarily upon our decision denying defendants' motion to suppress the fruits of a search of the Luddy residence. It is the contention of these defendants that the affidavit submitted

in writing to the issuing magistrate did not contain sufficient and adequate probable cause to support the issuance thereof. With that contention we disagree.

The affidavit was signed and sworn to on February 23, 1978 and the warrant issued on that date. The affidavit sets forth that on October 4, 1977 the affiant observed two specifically identified juveniles seated in an automobile in the parking lot of the Warwick Tavern passing something between themselves. Upon investigation it was determined that there was a quantity of cash in United States currency on the transmission hump of the automobile and driver's seat along with a pipe. These items were seized together with a small marijuana pipe with residue and other drug paraphenalia. The affiant likewise found in the vehicle a hand drawn map depicting a certain residence on Almshouse Road, Jamison, Warwick Township, Bucks County, Pennsylvania directly across the street from the St. Cyril Church. The house had the word "Mike's" next to it with a phone number of 348-0778. The female juvenile having been given her rights previously stated that she and the other juvenile were combining their money prior to going to the house on the map to buy a quantity of marijuana and the map was drawn so that they could find the house and the phone number was to be called if they became lost. The affidavit states that the phone number is an unlisted one belonging to one Michael Luddy of 1425 Almshouse Road, Jamison, Warwick Township, Bucks County, Pennsylvania.

Thereafter, according to the affidavit, a surveillance of the described premises was begun on October 6, 1977 and continued thereafter. From October 6, 1977 and for several months thereafter it was observed that a large

number of vehicles arrived at the premises, remained there for short periods of time, 10 to 15 minutes each, and that the occupants of those vehicles would enter and leave the premises. It is stated that the persons arriving under those circumstances included certain known drug users and small dealers naming specifically one Walter Rehm of York Road, Furlong, Pennsylvania who, allegedly, had been convicted of possession of narcotics. It is stated that checks with other police departments confirmed these facts. It is further stated that all of these vehicles would make their appearance at the residence at least three or more times from October 6, 1977 until February 22, 1978. The affidavit likewise specifically identified by description and license number 23 specific vehicles.

The affidavit then states that on February 21, 1978 at 19:30 hours a reliable informant who had provided other "police department" with information that led to the apprehension of an individual with marijuana and who had personally purchased marijuana at the above mentioned residence from Michael and Richard Luddy on several occasions over the past year and as recently as the week of February 13, 1978 and who provided the following information to the affiant: That Michael and Richard Luddy deal in marijuana from their residence in ounce and quarter pound quantities, they can also provide a purchaser with a half pound of marijuana but that the purchaser is required to wait a few days so as not to diminish the supply they have on hand at the residence. When L.S.D. is available that Richard and Michael Luddy also supply this drug substance from their residence. It is further stated that Michael and Richard Luddy have a distribution system that starts from their

residence for marijuana where one Tim Brown of Buckingham who has been observed at the Luddy residence in his black older model panel truck on several occasions and as recently as 6:30 o'clock P.M. on February 21, 1978. That Brown arrives and takes from Michael and Richard Luddy quarter pound quantities of marijuana, places them in his trunk and then distributes these quantities to juvenile or other young adult runners who in turn sell the quarter pounds they receive for cash which is then turned back over to Brown. The runners profit from the sales being that they receive a free quarter ounce of marijuana for their own use. It is lastly alleged that the cash is then split between Brown and Richard and Michael Luddy.

We are satisfied that the foregoing recital of facts from the affidavit adequately state sufficient probable cause to justify the issuance of the warrant. Probable cause has been stated to exist where the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a reasonable man of caution in the belief that an offense has been or is being committed. *Commonwealth v. Simmons,* _____ Pa. _____, 394 A.2d 431 (1978); *Commonwealth v. Perkins,* 473 Pa. 116, 373 A.2d 1076 (1977) and *Commonwealth v. Wilson,* 245 Pa. Superior Ct. 415, 369 A.2d 471 (1976). The same test of probable cause is applicable regardless of whether it is used to support an application for a search or arrest warrant, *Commonwealth v. Benjamin,* _____ Pa. Superior Ct. _____, 393 A.2d 982 (1978) and even to justify an arrest without a warrant. *Commonwealth v. Simmons, supra.* Although an affidavit may be based on hearsay information and need not reflect the direct personal

observations of the affiant, the magistrate must be informed of some of the underlying circumstances from which the informant concludes that the objects to be seized were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identify need not be disclosed, was credible or his information reliable. Essentially, the affiant must give facts sufficient to enable the magistrate to make two independent judgments; (1) that the affiant is probably correct in his belief that the informer is reliable, and (2) that what the informer told the affiant is probably accurate. *Commonwealth v. Archer,* 238 Pa. Superior Ct. 103, 352 A.2d 483 (1976); *Commonwealth v. Reisinger,* 252 Pa. Superior Ct. 1, 380 A.2d 1250 (1977); *Commonwealth v. Frye,* 242 Pa. Superior Ct. 144, 363 A.2d 1201 (1976). See also *Commonwealth v. Forster,* _____ Pa. Superior Ct. _____, 385 A.2d 416 (1978) and *Commonwealth v. Sangricco,* 475 Pa. 179, 379 A.2d 1342 (1977).

Here this two pronged test has been met. The officer's suspicions regarding the individuals in question and the activities transpiring at the named premises began on October 4, 1977 when he apprehended two specifically named individuals in their automobile at the Warwick Tavern parking lot handling a quantity of money and in possession of certain drug paraphenalia. He found in their possession a map showing the premises in question together with an unlisted telephone number of one of the defendants who was a resident at that premises. He was informed by one of those individuals that they intended to combine their money for the purpose of purchasing drugs at that premises. Based upon that information a surveillance of several months duration then ensued. In

the course of that surveillance the officer observed a large number of automobiles arriving at the premises and leaving a short period of time thereafter the occupants of which entered the premises and then left. Some of these persons were identified by the officer as being known drug users.

In addition, the affidavit cites information received by the affiant from an unnamed informant who disclosed that he had purchased narcotics from two of the named defendants at the premises on several occasions, the latest of which was during the week of February 13, 1978. The informant furthermore stated, and those statements were set forth in the affidavit from the affiant, the manner in which the drug traffic was conducted from the premises. We believe that the affidavit adequately sets forth the information received from the two named informants together with certain corroborating information specifically observed by the officer on October 4, 1977 which would be adequate to credit the information he received from them. Furthermore, there is information regarding his own investigation of the surveillance and the type of activities conducted at or around the premises over a period of several months. Lastly, and of greatest importance was the information the affiant received from an admittedly unnamed informant but who set forth specifically in the information given to the officer how he came upon the knowledge he had, including a statement against his own penal interest, together with a detailed recital of the activities which took place on the premises.

Several specific attacks were made upon the efficacy of the affidavit. At the suppression hearing the female juvenile, Brenda Fox, testified that she did not tell the

officer that she and her companion were going to the premises in question for the purpose of purchasing drugs. Rather, she testified that it was her intention to go there to visit with a girlfriend. The officer testified at the suppression hearing that the information as stated in the affidavit for the search warrant was what she had in fact said. Obviously, in a suppression hearing it is for the judge as the finder of fact to make findings on credibility. *Commonwealth v. Johnson*, 452 Pa. 130 (1973); *Commonwealth v. Joseph*, 451 Pa. 440 (1973) and *Commonwealth v. Murphy*, 219 Pa. Superior Ct. 459 (1971). Obviously, the suppression judge credited the police officer and not Brenda Fox at the suppression hearing.

It is alleged that the information secured from the unnamed informant has not been established on this record, or more accurately in the affidavit, so as to justify the issuing magistrate in affording it credibility. Initially it is stated that the informant had previously given information which led to the apprehension of an individual with marijuana. While it is clear that this is not such information from which a finding that convictions have been secured can be made, it is clearly the law that an informant's reliability can be established even though he gave no prior information leading to convictions. His prior information can be established to be accurate by other means. *Commonwealth v. Benjamin, supra.* It is well settled that an informant's reliability may be established in several ways: (1) Did the informant give prior reliable information? (2) Was the informant's story corroborated by any other source? (3) Were the informant's statements a declaration against interest? (4) Does the defendant's reputation support the informant's tip? *Commonwealth v. Hunt*, _____ Pa. Superior Ct. _____, 389 A.2d 640

(1978). At least three if not four of these tests were established in this case. The affidavit sets forth that the informant did give prior reliable information which led to the apprehension of at least one individual in possession of marijuana. The informant's story was, to some extent, corroborated by the observations of the officer during the course of his several months surveillance of the premises and further by the statements made to him by the two juveniles on the evening of October 4, 1977. Clearly the informant's statements constituted declarations against interest when he stated to the officer that he had, himself, made several purchases of drugs from some of the defendants in the premises in question, the last of which was as late as the week of February 13, 1978. Lastly, the officer testified as to his own knowledge of the reputation of the defendant. Therefore, we are satisfied that that informant's reliability was firmly established in the body of the affidavit.

Clearly, the affidavit does not constitute a paragon of literary excellence worthy of a Scott Fitzgerald or Ernest Hemingway. However, it is clear that the affidavit to a search warrant must be given a usual every day layman's interpretation on which any reasonable and prudent man would act, and not a legally technical interpretation. *Commonwealth v. Conner,* 452 Pa. 333 (1973); *Commonwealth v. Thomas,* 448 Pa. 42 (1972). In this light, we are satisfied that the affidavit sufficiently and adequately sets forth that the information attributable to the unnamed informant was related to the affiant.

Defendants contend that the information contained in the affidavit was stale and not adequate to establish that the alleged criminal activity was continuing as of the time of the issuance of the warrant. Of course, informa-

tion which is unreasonably old or stale may not support probable cause for the purpose of the issuance of the search warrant. *Commonwealth v. Hagen,* 240 Pa. Superior Ct. 444, 368 A.2d 318 (1976); *Commonwealth v. Deren,* 233 Pa. Superior Ct. 373 (1975) and *Commonwealth v. Shaw,* 444 Pa. 110 (1971). The facts as stated in the affidavit must show criminal activity up to the time of the issuance of the search warrant. *Commonwealth v. Maldonado,* _____ Pa. Superior Ct. _____, 393 A.2d 962 (1978). The affidavit clearly fulfills that requirement. The investigation began on October 4, 1977, approximately four and one half months prior to the time of the issuance of the warrant. However, the officers did not seek a warrant or proceed at that time on the information they received on that date. Rather they began their investigation then and conducted a surveillance which continued for several months. The ongoing investigation culminated with the information the officers received from their unnamed informant which, *inter alia,* revealed that he had made a purchase of drugs at the premises and from two of the named defendants as late as the week of February 13, 1978. Of course, the affidavit must be considered in its entirety. *Commonwealth v. Bryant,* 247 Pa. Superior Ct. 386, 372 A.2d 880 (1977).

Lastly, defendants contend that the affidavit is infirm because it contains certain misinformation. The affidavit provides that among those persons observed by the officer over the several months of his surveillance arriving and leaving from the premises in question including known drug users and small dealers and identifies specifically one Walter Rehm of York Road, Furlong, Pennsylvania alleging further that he had been convicted of possession of narcotics. Walter Rehm testified at the

suppression hearing that he had never been at the premises in question, that he had never been arrested or convicted of any crime. He further testified, however, that he was the owner of a certain Volkswagen automobile which was observed by the officer as one of those arriving and departing from the premises during the course of his surveillance. He likewise testified that he had two sons, one of whom is Patrick Warner Rehm.

The police officer testified at the suppression hearing that when he observed that particular Volkswagen in question he wrote down the license number and caused a check to be made through the computer at Harrisburg revealing that it was a motor vehicle belonging to the said Walter Rehm. He further testified that he did a check with the District Attorney's office in Bucks County and found that an individual named Rehm of the same address as the owner of the motor vehicle had been previously convicted of the crime of possession of marijuana. It cannot be denied that the specific identification of Walter Rehm as the person observed arriving at the premises was a mis-statement of fact. The officer quite frankly conceded that he did not know Walter Rehm and did not specifically know the person who had arrived in the motor vehicle in question and entered the premises when he observed it.

In *Commonwealth v. D'Angelo,* 437 Pa. 331 (1970) the court reversed a conviction where a search warrant had been procured on the basis of false information delivered to a magistrate. However, in *Commonwealth v. Jones,* 229 Pa. Superior Ct. 224 (1974) *D'Angelo* was interpreted as applying only to *deliberate* mis-statements of *material* facts by police officers to magistrates in the securing of a search warrant. A material fact is one without which

probable cause would not exist. *Commonwealth v. Wiggins,* 239 Pa. Superior Ct. 256, 361 A.2d 750 (1976). See also *Commonwealth v. Yucknevage,* _____ Pa. Superior Ct. _____, 390 A.2d 225 (1978). Certainly there is no evidence to show that the mis-statement regarding the identity of Walter Rehm was a deliberate one by the officer. He candidly based upon the information he received regarding the ownership of the vehicle he had personally observed and the information he received from the District Attorney's office regarding the conviction of a person named Rehm residing at the same premises as Walter Rehm.

In any event, we are satisfied that this statement is not material. As previously stated, the question of materiality is whether without the mis-stated information there would be probable cause stated in the affidavit notwithstanding. *Commonwealth v. Wiggins, supra.* Regardless of the question of the deliberateness of such statement, in deciding whether a mis-statement is material the test is not whether the mis-statement strengthens the application but rather whether it is essential to it. This is determined by deleting the mis-statement from the application, and then seeing whether the application still states enough to show probable cause. *Commonwealth v. Yucknevage, supra* and *Commonwealth v. Ambers,* 225 Pa. Superior Ct. 381 (1973). Even excising this one reference to one Walter Rehm the affidavit more than states sufficient and adequate probable cause to justify the issuance of the warrant.

Edmund Luddy likewise contests the constitutionality of the search which revealed the evidence upon which his conviction was founded. He was convicted of possession of a small quantity of methamphetamine found upon his

person. As the raiding party arrived at the premises in question for the purpose of execution of the search warrant they approached the house. Approximately 20 feet from the rear door to the house they observed a shed and Edmund Luddy was observed either in the shed or about to exit it. One of the police officers apprehended him while the others proceeded to the house to execute the search warrant. The officer who apprehended him did a pat down search and upon feeling something which he perceived to be as in the nature of a knife in one of Edmund Luddy's pockets, he reached inside and extracted a syringe. Believing that the syringe contained some residue of a controlled substance the officer then conducted a further search of Edmund's pockets and extracted therefrom a cigarette box and found therein the small quantity of methamphetamine in question. Edmund was then required to enter the house where the other residents were found and the search then proceeded.

We are satisfied that the procedures taken with regard to Edmund were constititutionally permissible. Clearly Edmund was apprehended and for our purposes his liberty had been restrained when he was found in the shed. It is obvious that the purpose of the officer in apprehending him was to require that he enter the house to abide the event of the execution of the search warrant and the search of the premises. He was not to be permitted to leave. We believe that that was understandable in view of the fact that Edmund Luddy was specifically named in the search warrant itself as one of the residents of the premises. Clearly where a search warrant is issued for the search of a premises naming the residents thereof and the residents are found on the premises, it is per-

missible and reasonable for the searching officers to require that the residents who are found there remain there while the search is in progress to determine whether in fact there is criminal activity afoot. It was not unreasonable, therefore, having found Edmund Luddy in a shed within the curtilage not more than 20 feet from the rear door to the premises to require that he enter to await the outcome of the search.

Considering that he was a named resident of the premises and therefore one of the persons who could be detained and conceivably one of the persons guilty of the criminal behavior described in the affidavit, we believe that it was reasonable for the police officers to have made the precautionary pat down in their own self protection. The suppression judge credited the police officer's testimony that as a result of the pat down he reasonably believed that the bulge he felt in the defendant's pocket was a knife. As such, it was clearly reasonable for the officer to extract the article which he felt. Although it proved not to be a knife it proved to be a syringe which the officer reasonably believed to contain the residue of some controlled substance. It is general knowledge, of course, that syringes are used for the injection and ingestion of controlled substances by users thereof. That being the case, the officer at that time had probable cause to believe that the defendant was guilty of a violation of the Controlled Substance Drug, Device and Cosmetic Act and therefore had a right to arrest and conduct a search incident to that arrest. See *Commonwealth v. Hill*, 237 Pa. Superior Ct. 543, 353 A.2d 870 (1975); *Commonwealth v. Everett*, 234 Pa. Superior Ct. 249 (1975). Where such incidental search is made the officer may open and inspect the interior of any con-

tainers or packages removed from the person of the defendant. *Commonwealth v. Timko,* 251 Pa. Superior Ct. 442, 380 A.2d 861 (1977).

We do not believe that such cases as *Commonwealth v. Reece,* 437 Pa. 422 (1970); *Commonwealth v. Bourke,* 218 Pa. Superior Ct. 320 (1971) and *Commonwealth v. Platou,* 455 Pa. 258 (1973) derogate from this result, but rather we believe they indicate it. In each of those cases the courts held that the search of an individual incidentally found at or near a premises which was the object of a search warrant did not, without more, meet constitutional standards. It should be noted that in each of those cases the person searched was only coincidentally found upon or near the premises but was not a resident or an individual with any possessory interests in the premises to be searched. Here, to the contrary Edmund Luddy was named in the warrant as a resident of the premises and, therefore, we believe that he could be detained and if detained at least protectively patted down for weapons.

The motion in arrest of judgment is based upon the alleged insufficiency of the evidence. The test of the sufficiency of the evidence, of course, is whether, accepting as true all the evidence and all the reasonable inferences therefrom favorably to the Commonwealth, it is sufficient in law to prove beyond a reasonable doubt that the defendant is guilty of the crimes of which he or she has been convicted. *Commonwealth v. Sullivan,* 472 Pa. 129, 371 A.2d 468 (1977); *Commonwealth v. Davis,* 466 Pa. 102, 351 A.2d 642 (1976) and *Commonwealth v. Waters,* 463 Pa. 465, 345 A.2d 613 (1975). Of course, the same standard applies to a trial without a jury. *Com-*

monwealth v. Mobley, 467 Pa. 460, 359 A.2d 367 (1976) and *Commonwealth v. Green*, 464 Pa. 557, 347 A.2d 682 (1975).

Defendants Edmund Luddy, Jr. and Filomena Luddy were convicted of possession of controlled substances, while defendants Timothy John Brown and Michael J. Luddy were convicted of possession, possession with intent to deliver and conspiracy to commit those crimes, all in violation of the Controlled Substance, Drug, Device and Cosmetic Act, the Act of April 14, 1972, P.L. 233, No. 64, §1, 35 P.S. 780-101 *et seq.* All of the arrests, charges and ultimate convictions arose out of the search conducted at the Luddy residence, located and situated at 1425 Almshouse Road, Warwick Township, Bucks County, Pennsylvania on the 23rd day of February, 1978. At that time a search of the premises was conducted by the Warwick Township Police under and pursuant to a search warrant issued. All of these defendants were, at that time, found in or about the residence.

Edmund Luddy, Jr. was arrested as the police raiding party approached the premises, he then being either in or immediately outside of a shed on the premises in question. Upon his arrest he was searched pursuant thereto and certain items found upon his person, including a small quantity of methamphetamine. It was as a result of the finding of this small quantity of methamphetamine that he was arrested and the charges of possession contained in criminal information 710-1 of 1978 sessions was based upon that finding. Obviously, these items were found directly in his possession and therefore there is no question that the evidence is sufficient to support the finding of guilty of possession on that criminal information and against that defendant.

The other three defendants were arrested as a result of what the officers found in the course of their search of the premises. Upon entry into the bedroom on the second floor at the northeast corner of the house, Brown was observed sitting in the middle of the floor with a scale immediately in front of him. Immediately next to the scale was a large aluminum flat pan containing a substance which was subsequently identified to be marijuana. At that time he was in the process of filling a transparent bag with the marijuana and placing it on the scale for the purpose of determining its weight. In that room at that time were defendants Richard and Michael Luddy and Patrick Rehm. Defendant John Charles Froelich was seen leaving that bedroom immediately before the police officers entered.[1] All of those defendants were arrested and sent downstairs by Chief James McAllister of the Warwick Township Police Department who, together with other officers, then commenced a search of that bedroom. In the closet they found a large green plastic garbage containing three smaller clear transparent plastic bags one of which was subsequently determined to contain marijuana. In a drawer in the dresser, under some clothing, another clear plastic bag containing what was subsequently determined to be marijuana was likewise found. The search further revealed certain letters and a wallet on the night table in that bedroom. A search of the refrigerator in the kitchen disclosed a quantity of marijuana contained in two clear plastic bags in the crisper section of the refrigerator. The foregoing represents the evidence secured as a result of the search and constitutes the basis upon which the verdicts of guilty were returned.

[1] Defendants John Charles Froelich, Richard Russell Luddy and Patrick Warner Rehm were found not guilty at the close of the trial.

The foregoing represents the evidence presented by the Commonwealth. There was no evidence presented by any of the defendants.[2] We are satisfied that it is sufficient to support the convictions in this case. As noted, Edmund Luddy was convicted of possession based upon the substances found on his person when he was searched after his arrest at the shed outside of the residence. Timothy Brown and Michael Luddy were convicted of possession, possession with intent to deliver and conspiracy to commit those crimes while Filomena Luddy were convicted merely of possession. Illegal possession of drugs is a crime which is unique to the individual and which by definition can only be committed by the possessor. Guilt by association is not enough. *Commonwealth v. Fortune,* 456 Pa. 365 (1974); *Commonwealth v. Tirpak,* 441 Pa. 534 (1971); *Commonwealth v. Maurer,* 240 Pa. Superior Ct. 471 (1976) and *Commonwealth v. Updegrove,* 223 Pa. Superior Ct. 7 (1972). Absent literal possession, the Commonwealth may sustain its burden by showing constructive possession, which requires that the Commonwealth prove that the defendant had the power to control the contraband and the intent to exercise that control. *Commonwealth v. Townsend,* 428 Pa. 281 (1968); *Commonwealth v. Maurer, supra;* and *Commonwealth v. Updegrove, supra.* Obviously, the fact of possession loses all persuasiveness if persons other than the defendant had equal access with him or her to the place in which the property is discovered. *Commonwealth v. deCampli,* 243 Pa. Superior Ct. 69 (1976). It is equally true, however, that constructive

[2] Defendant Brown called defendant Rehm as a witness on his behalf but Rehm refused to testify based upon the Fifth Amendment to the United States Constitution and his Fifth Amendment claim was sustained by the court.

possession may properly be inferred from the totality of the circumstances which attend each case. An accused may be charged with the knowledge of the location of the contraband, which is essential to the proof of the intent to exercise control, if the contraband is found in places peculiarly within the control of the accused. *Commonwealth v. Maurer, supra; Commonwealth v. Ferguson,* 231 Pa. Superior Ct. 327 (1974). Individually, the circumstances may not be decisive. However, in combination they may justify an inference that the defendant had both the power to control and the intent to exercise that control which is required to prove constructive possession. *Commonwealth v. deCampli, supra; Commonwealth v. Cash,* 240 Pa. Superior Ct. 123, 367 A.2d 726 (1976) and *Commonwealth v. Chenet,* 473 Pa. 181, 373 A.2d 1107 (1977). Obviously, therefore, there can be constructive possession, *Commonwealth v. Cash, supra; Commonwealth v. Samuels,* 235 Pa. Superior Ct. 192 (1975) and a defendant may be convicted of possession when the contraband is found on premises where the defendants and others had access if it can be shown that he had joint constructive possession. *Commonwealth v. Chenet, supra.* See also, *Commonwealth v. Maurer, supra; Commonwealth v. Cooper,* ___ Pa. Superior Ct. ___, 362 A.2d 1041 (1976) and *Commonwealth v. Hicks,* ___ Pa. Superior Ct. ___, 364 A.2d 505 (1976). Joint possession cannot be established merely from presence in a room where items charged as having been possessed or found with the opportunity to use them. See *Commonwealth v. Tirpak, supra; Commonwealth v. LaRosa,* 218 Pa. Superior Ct. 203 (1971) and *Commonwealth v. Schuloff,* 218 Pa. Superior Ct. 209 (1971). It might be said that mere presence, plus the fact of being the owner of the

premises, is not enough. Equal access is not enough. *Commonwealth v. Hannan*, 229 Pa. Superior Ct. 40 (1974) and *Commonwealth v. Ferguson, supra.* But, compare, *Commonwealth v. Cubler*, 236 Pa. Superior Ct. 614 (1975) and *Commonwealth v. W s*, 240 Pa. Superior Ct. 278, 362 A.2d 273 (1976).

Based upon the foregoing, it is clear to us that the evidence with regard to defendant Brown was more than sufficient to prove possession and possession with intent to deliver the marijuana in question. He was observed seated upon the floor with the scale immediately in front of him in the process of scooping marijuana from the large flat pan into clear plastic bags and then weighing at least one of them. Obviously, he was exercising dominion and control over the marijuana immediately before him and we are satisfied that from the fact that he was placing it into the clear plastic bags and weighing it, the inference of intent to deliver naturally and reasonably arose.

Therefore we are satisfied that the evidence was sufficient to convict Michael of the same crimes. The foregoing activities of Brown were taking place immediately in his presence and in his view. Additionally, we are satisfied that these activities were taking place in Michael's room. Chief McAllister described this as Michael's room and testified that he was aware of the fact that it was Michael's room from prior contact he had had with Michael approximately one year earlier.

Of course, little weight can be attributed to that unsupported and uncorroborated declaration of the chief. However, there is other evidence in that case to support that conclusion. The room was obviously a bedroom, it containing as furniture a bed, a night table, and a bureau. From the photographs taken of the

closet and the interior of at least one of the drawers of the bureau, it is obvious that it was a man's room because there are men's clothing in evidence in both places. On the night table seven letters and a wallet were found and taken into evidence. Three of the letters were addressed to Michael and his two brothers and the other three were addressed to Michael only. On the back of one of the envelopes was a personal note written to Michael from someone named Dawn. From the combination of the foregoing we are satisfied that the Commonwealth has adequately established that this was Michael's room. Therefore, we have no difficulty in determining that the evidence was sufficient to find that Michael was in possession of the quantity of marijuana found secluded in the closet in this room and in one of the dresser drawers under some clothing.

Additionally, we are satisfied that the evidence is sufficient to support the conviction of Michael of possession with intent to deliver. As noted, he was present in his own room and observing while Brown was in the process of bagging and weighing the marijuana immediately before him in the flat pan. Additionally, an extremely large quantity of marijuana was found secluded in the closet and in the dresser drawer of that room. It is now clear that the Commonwealth may establish the intent to deliver circumstantially solely from the quantity of drugs found in a defendant's possession. *Commonwealth v. Harmes*, ___ Pa. Superior Ct. ___, 386 A.2d 551 (1978); *Commonwealth v. Smith*, 250 Pa. Superior Ct. 460, 378 A.2d 1239 (1977); *Commonwealth v. Kishbach*, 247 Pa. Superior Ct. 557, 373 A.2d 118 (1976) and *Commonwealth v. Santiago*, 462 Pa. 216, 340 A.2d 440 (1975). In Michael's case, not only is the evidence sufficient based upon the extremely large quantity, but when added

to the fact that he was present while Brown was bagging and weighing the marijuana, we are satisfied that the evidence was more sufficient to support the conviction of possession with intent to deliver. We are likewise satisfied, based upon the foregoing evidence, that the Commonwealth has borne its burden of proving the charges of conspiracy as between Brown and Michael Luddy.

With regard to Filomena Luddy, she was convicted of possession solely of the marijuana found in the refrigerator. Once again, the testimony of Chief McAllister was that this was the Luddy home where Mrs. Luddy and her sons lived. When the raiding party arrived they knocked upon and entered through the rear door which entered into the kitchen. Immediately before their entry they observed Mrs. Luddy in the kitchen with a roast in a roasting pan. The marijuana found in the refrigerator was, obviously, found in the kitchen. Assuming, as we think we may, that the person performing the cooking function for the family unit, in this case Filomena Luddy, is the captain of that particular ship, then we have no difficulty in determining that she was aware of and likewise in possession of the content of the refrigerator, it being an obvious adjunct to the culinary endeavor. Possession does not necessarily connote ownership. Obviously, from the fact that the substance in question was found in the refrigerator there is sufficient evidence from which a fact finder could conclude that Filomena Luddy knew it was there. Likewise, based on all of the surrounding circumstances including the fact that the substances were in the refrigerator over which she had dominion and control, together with the fact

that large quantities were found elsewhere in the house, particularly in Michael's room, there are sufficient facts from which a finder of fact could conclude that Filomena Luddy had the intention of controlling what happened to this substance. With those two factors established, there is sufficient evidence to find that she was in possession even though other persons may likewise have had access to the refrigerator and the substances contained therein. While concededly *Commonwealth v. Tirpak*, 441 Pa. 534 (1971) and its progeny holds that equal access alone is not a sufficient basis upon which to find possession, none of those cases hold that the mere fact that other persons may likewise have possession necessarily denegates from a finding of possession. Were that to be the case then there could never be a finding of joint constructive possession. See for example *Commonwealth v. Chenet*, 237 Pa. Superior Ct. 226 (1975). Based upon that, which we consider to be a fair inference, we are satisfied that the evidence was sufficient to support the conviction of Filomena Luddy of possession of the marijuana found in the crisper section of her refrigerator.

As the foregoing amply demonstrates we are satisfied that the defendants' post trial motion as in the nature of a motion in arrest of judgment must be denied.

ORDER

AND NOW, to with this 14th day of February 1979, it is hereby ordered, directed and decreed that defendants' motions in arrest of judgment and for a new trial are denied, dismissed and overruled and defendants are directed to appear in court room No. 2 in the court house at Doylestown, Pa. at 10 A.M. on the 5th day of March 1979 for the purpose of imposition of sentence.

BY THE COURT,

/s/ ISAAC S. GARB
J.